

No. 47931-1-11

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

Daniel Terry

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Judge Mary Wilson  
Cause No. 15-1-00577-8

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SUPPLEMENTAL BRIEF OF RESPONDENT

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A. SUPPLEMENTAL ISSUES.

1. Whether, if the State substantially prevails on appeal and submits a proper request for costs, the Court of Appeals should award those appellate costs.

2. What procedure should the Court of Appeals use in deciding whether to award appellate costs?

B. SUPPLEMENTAL FACTS.

1. Procedure.

The parties have submitted their briefs regarding issues raised by the appellant. In light of State v. Sinclair, \_\_\_ Wn. App. \_\_\_, (2016) (2016 Wash. App. LEXIS 116). Cantley has filed a supplemental brief asking the Court of Appeals to decline to award costs to the State in the event the State substantially prevails in this appeal and asks for such costs. The Court has permitted the State to file a supplemental response brief.

2. Facts.

In its initial response brief, the State set forth the substantive facts, and incorporates the facts and arguments in that brief herein.

All of the legal financial obligations (LFOs) imposed by the trial court were the mandatory: \$500 for the crime victim's assessment, \$200 filing fee, \$100 felony DNA fee, and the

discretionary \$115 domestic violence fee (10.99.080(1)) which states the courts "may" impose). Sentencing RP 21.

Terry's date of birth is April 11, 1964, making him 51 years old at this time. He was sentenced to serve to sixty months in the Department of Corrections. Sentencing RP 21.

Terry testified that he lives in his trailer off McPhee Road in Olympia. Trial RP 157. He also receives social security and panhandles to support himself. Trial RP 158. On a regular basis, he begins his panhandling each morning around 8:00 am. Trial RP 158. Terry stated he panhandles multiple hours a day to purpose his drug and alcohol problem. Id. Terry also testified that he had both of his hips replaced and that is why he gets social security. Id. While the trial court did find Terry indigent at the beginning and end of the proceedings, Terry does describe how he still gets around town and is mobile throughout the trial.

#### C. ARGUMENT.

Legal financial obligations and appellate costs are appropriate in this case if the court affirms the judgment.

Under RCW 10.73.160, an appellate court may provide for the recoupment of appellate costs from a convicted defendant. State v. Blank, 131 Wn.2d 230, 234, 930 P.2d 1213 (1997); State v.

Mahone, 98 Wn. App. 342, 989 P. 2d 583 (1999). As the Court pointed out in Sinclair, *supra*, at \*10, the award of appellate costs to a prevailing party is within the discretion of the appellate court. See, *also* RAP 14.2; State v. Nolan, 141 Wn.2d 620, 8 P.3d 300 (2000). So, the question is not: can the Court can decide whether to order appellate costs; but when, and how?

The legal principle that convicted offenders contribute toward the costs of the case, and even appointed counsel, goes back many years. In 1976<sup>1</sup>, the Legislature enacted RCW 10.01.160, which permitted the trial courts to order the payment of various costs, including that of prosecuting the defendant and his incarceration. *Id.*, .160(2). In State v. Barklind, 82 Wn.2d 814, 557 P.2d 314 (1977), the Supreme Court held that requiring a defendant to contribute toward paying for appointed counsel under this statute did not violate, or even “chill” the right to counsel. *Id.*, at 818.

In 1995, the Legislature enacted RCW 10.73.160, which specifically authorized the appellate courts to order the (unsuccessful) defendant to pay appellate costs. In Blank, 131 Wn.2d at 239, the Supreme Court held this statute constitutional,

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<sup>1</sup> Actually introduced in Laws of 1975, 2d Ex. Sess. Ch. 96.

affirming the Court of Appeals' holding in State v. Blank, 80 Wn. App. 638, 641-642, 910 P.2d 545 (1996).

Nolan, 141 Wn.2d 620, noted that in State v. Keeney, 112 Wn.2d 140, 769 P.2d 295 (1989), the Supreme Court found the imposition of statutory costs on appeal in favor of the State against a criminal defendant to be mandatory under RAP 14.2 and constitutional, but that "costs" did not include statutory attorney fees. Keeney, 112 Wn.2d at 142.

Nolan examined RCW 10.73.160 in detail. The Court pointed out that, under the language of the statute, the appellate court had discretion to award costs. 141 Wn.2d at 626, 628. The Court also rejected the concept or belief, espoused in State v. Edgley, 92 Wn. App. 478, 966 P.2d 381 (1998), that the statute was enacted with the intent to discourage frivolous appeals. Nolan, at 624-625, 628.

In Nolan, as in most of other cases discussing the award of appellate costs, the defendant began review of the issue by filing an objection to the State's cost bill. Id., at 622. As suggested by the Supreme Court in Blank, 131 Wn.2d at 244, this is an appropriate manner in which to raise the issue. The procedure invented by Division I in Sinclair, at \*12-13, prematurely raises an issue that is not before the Court. The defendant can argue regarding the

Court's exercise of discretion in an objection to the cost bill, if he does not prevail, and if the State files a cost bill.

Under RCW 10.73.160, the time to challenge the imposition of LFOs is when the State seeks to collect the costs. See Blank, 131 Wn.2d at 242; State v. Smits, 152 Wn. App. 514, 216 P.3d 1097 (2009) (citing State v. Baldwin, 63 Wn. App. 303, 310-311, 818 P.2d 1116 (1991)). The time to examine a defendant's ability to pay costs is when the government seeks to collect the obligation because the determination of whether the defendant either has or will have the ability to pay is clearly somewhat speculative. Baldwin, 63 Wn. App. at 311; see also State v. Crook, 146 Wn. App. 24, 27, 189 P.3d 811 (2008). A defendant's indigent status at the time of sentencing does not bar an award of costs. Id. Likewise, the proper time for findings "is the point of collection and when sanctions are sought for nonpayment." Blank, 131 Wn.2d at 241-242. See also State v. Wright, 97 Wn. App. 382, 965 P.2d 411 (1999).

The defendant has the initial burden to show indigence. See State v. Lundy, 176 Wn. App. 96, 104 n.5, 308 P.3d 755 (2013). Defendants who claim indigency must do more than plead poverty in general terms in seeking remission or modification of LFOs. See State v. Woodward, 116 Wn. App. 697, 703-704, 67 P.3d 530

(2003). The appellate court may order even an indigent defendant to contribute to the cost of representation. See Blank at 236-237, quoting Fuller v. Oregon, 417 U.S. 40, 53-53, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974).

While a court may not incarcerate an offender who truly cannot pay LFOs, the defendant must make a good faith effort to satisfy those obligations by seeking employment, borrowing money, or raising money in any other lawful manner. Bearden v. Georgia, 461 U.S. 660, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1976); Woodward, 116 Wn. App. at 704.

The imposition of LFOs has been much discussed in the appellate courts lately. In State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015), the Supreme Court interpreted the meaning of RCW 10.01.160(3). The Court wrote that:

The legislature did not intend LFO orders to be uniform among cases of similar crimes. Rather, it intended each judge to conduct a case-by-case analysis and arrive at an LFO order appropriate to the individual defendant's circumstances.

Id., at 834. The Court expressed concern with the economic and financial burden of LFOs on criminal defendants. Id., at 835-837.

The Court went on to suggest, but did not require, lower courts to consider the factors outlined in GR 34. Id., at 838-839.

By enacting RCW 10.01.160 and RCW 10.73.160, the Legislature has expressed its intent that criminal defendants, including indigent ones, should contribute to the costs of their cases. RCW 10.01.160 was enacted in 1976 and RCW 10.73.160 in 1995. They have been amended somewhat through the years, but despite concerns about adding to the financial burden of persons convicted of crimes, the Legislature has yet to show any sympathy.

The fact is that most criminal defendants are represented at public expense at trial and on appeal. Almost all of the defendants taxed for costs under RCW 10.73.160 are indigent. Subsection 3 specifically includes "recoupment of fees for court-appointed counsel." Obviously, all these defendants have been found indigent by the court. Under the defendant's argument, the Court should excuse any indigent defendant from payment of costs. This would, in effect, nullify RCW 10.73.160(3).

As Blazina instructed, trial courts should carefully consider a defendant's financial circumstances, as required by RCW 10.01.160(3), before imposing discretionary LFOs. But, as Sinclair

points out at \*12, the Legislature did not include such a provision in RCW 10.73.160. Instead, it provided that a defendant could petition for the remission of costs on the grounds of "manifest hardship." See RCW 10.73.160(4).

Certainly, in fairness, appellate courts should also take into account the defendant's financial circumstances before exercising its discretion. It is to be hoped, pursuant to Blazina, that trial courts will develop a record that the appellate courts may use in making their determination about appellate costs. Until such time as more and more trial courts make such a record, the appellate courts may base the decision upon the record generally developed in the trial court, or, if necessary, supplemental pleadings by the defendant.

As pointed out in the facts section above and in the court proceedings, the record reflects that the defendant has a way of obtaining financial resources. While Terry is older and receives disability, he is still able bodied. Terry is capable of developing marketable skills and obtaining employment. Terry panhandles for hours at a time. This shows that he can work part time and has the social skills to interact with people. Therefore, Terry is capable of reimbursing the State for the allowable costs of his appeal in the event she does not prevail.

In this case, the State has yet to "substantially prevail." It has not submitted a cost bill. Any assertion that the defendant cannot and will never be able to pay appellate costs a decision that can't be made now. This Court should wait until the cost issue is ripe before exploring it legally and substantively.

**D. CONCLUSION.**

The Legislature has expressed its intent that criminal defendants contribute to the costs of the prosecution and appeal of their cases. Whether this is good or bad policy is a matter for the Legislature.

In the present case, the record shows that the defendant had resources and job skills indicating an ability to pay costs now or in the future. The State respectfully requests that, in the event that the conviction is upheld, costs be taxed as requested by the State.

Respectfully submitted this 18<sup>th</sup> day of March, 2016.



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Jennifer Zorn, WSBA# 49318  
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CERTIFICATE OF SERVICE

I certify that I served a copy of the Supplemental Brief of Respondent on the date below as follows:

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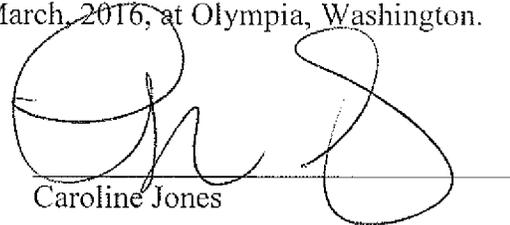
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--AND TO--

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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 18 day of March, 2016, at Olympia, Washington.

  
Caroline Jones

# THURSTON COUNTY PROSECUTOR

**March 18, 2016 - 11:33 AM**

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